UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

Argued: June 11, 1982

August 30, 1982

Before

Hon. HARLINGTON WOOD, JR., Circuit Judge

Hon. RICHARD A. POSNER, Circuit Judge

Hon. WILLIAM J. CAMPBELL, Senior Dist. Judge*

NATIONAL LABOR RELATIONS BOARD, Petitioner, vs. A & D DAVENPORT TRANSPORTATION, INC., and SUN-FAIR SPECIAL SERVICE TRANSPORTATION, A Division of A & D Transportation, Inc., Respondents.	)	Petition for Enforcement of an Order of the National Labor Relations Board.

No. 81-2777

ORDER

The National Labor Relations Board filed this application for enforcement of its order requiring the respondent, Sun-Fair Special Service Transportation ("Sun-Fair"), to reinstate,

with back pay, seven employees discharged in violation of Sec. 8(a)(1) of the National Labor Relations Act, 29 U.S.C. Sec. 158(a)(1).1/ The Board affirmed the decision of the Administrative Law Judge ("ALJ") and adopted his opinion. 256 NLRB No. 79. The ALJ concluded the company violated Sec. 8(a)(1) first when it discharged seven employees for expressing their dissatisfaction with working conditions in a questionnaire the company drafted and circulated to the employees at a meeting to air grievances, and second when the company conditioned the discharged employees' reinstatement on their adoption of another company drafted document admitting their regret over the previous incident. The company asserts that there was not substantial evidence in the record to support either conclusion.

I.

Using converted station wagons and buses, Sun-Fair transports handicapped and other medically debilitated individuals from their homes to hospitals, physician's offices, and other medical treatment facilities. Sun-Fair provides only non-emergency transportation services; it is not an ambulance service. In April 1979, the company employed eleven drivers to chauffer patients to medical appointments. Nearly 100% of the company's gross revenue was derived from transportation services provided to public medical assistance recipients under which set the rates for those services. By April 1979 six years had passed since the Department authorized a rate increase. Though receiving over

$400,000 in gross revenues in 1978, the company operated at a $55,000 net deficit that year.

While the driver's had long been disenchanted with their wages and other employment benefits, the labor dispute at issue developed on Saturday, March 31, 1979, when five Sun-Fair drivers met privately at the home of driver Richard Warfield to descuss their dissatisfaction with their jobs. They decided to present their grievances to Roy Montgomery, the general manager at Sun-Fair. Therefore, before work the following Monday, Warfield met with Montgomery alone. They discussed the employee's proposals for a wage increase, employer -paid hospitalization insurance, and a formal lunch hour. Montgomery, though sympathetic, rejected the requests. He explained that, already operating at a loss,the

company could ill-afford to pay its drivers more money. Thus, the meeting ended with the issue unresolved and Warfield returned to work.

At approximately 11:30 that morning, Warfield announced over the two-way radio in each vehicle that all drivers should return to Sun-Fair offices by noon to discuss with Montgomery their demands for a wage increase. Though neither Montgomery nor other Sun-Fair officials authorized the announcement, Montgomery did not intervene on the radio and order the drivers to ignore the call. To the contrary, the ALJ found that Montgomery ratified the order because when several drivers radioed to ask whether to obey the call, Montgomery told them to return to base.

By noon eleven drivers had arrived and the meeting began. Montgomery did not object that the meeting had been called. Rather, he began the meeting by stating that Warfield was the drivers' spokesman. Warfield repeated the demands presented to Motgomery earlier. He requested a pay raise, insurance, and a lynch hour. In response, Montgomery repeated his earlier explanation that because the company depended entirely on the State of Illinois for revenues and was already operating at a loss, a wage or benefit increase was infeasible until the state first raised rates paid transportation providers. The meeting lasted approximately one hour. During the meeting, Montgomery received several telephone calls from local department

of Public Aid Officials complaining that some patients were stranded and others had already missed medical appointments because the company failed to pick them up. Montgomery told the callers that the company had a "labor dispute" and he would return their calls.

After Montgomery explained the company's position, Warfield stated that if the employees did not receive a wage increase "We will have to go, see?" At that point, Dorothy Davenport, the owner of the company, intervened and rejected the demands. Warfield then stated that no one could drive a vehicle off company grounds. Though Davenport denied making the next statement, the ALJ found she then told the drivers to get off her property. About the same time Montgaomery circulated a document

which he drafted during the meeting. The document required each employee to answer whether he "want(ed) to work under present conditions." Four drivers indicated their sastifaction with the status quo. The seven other drivers indicated their dissatisfaction. Before signing the document, one employee asked Montgomery whether expressing his dissatisfaction would result in his discharge. Montgomery replied that he was undecided. After all the drivers signed the document, Montgomery said "you all can leave now." The seven dissatisfied drivers left the premises; those remaining returned to work.

The seven employees went to the local police station to inquire about regaining their jobs. They

told the police that they had been fired. Meanwhile, because of the labor dispute, the Illinois Department of Public Aid suspended Sun-Fair for two weeks from the list of transportation providers.

The seven employees reported the next morning for work on schedule and in uniform. Upon arriving, they found their time cards had been removed. Montgomery told them that "there was no work for them." The employees then gave Montgomery a list of grievances and asked to return to work. Montgomery refused. One driver then asked Davenport, who had arrived a few minutes earlier with the police, to reinstate him. Davenport told him "you do not work here anymore." The employees reappeared at the Sun-Fair offices on April 4 and

April 5 and finally on April 10 to collect their final pay checks. Montgomery required the drivers to return their uniforms.

Within one week of the discharges, the company hired two new drivers. Within two weeks, the Department of Public Aid lifted the suspension and the company was operating at pre-despute work levels, had reinstated two other discharged employees, and offered to rehire Warfield and the remaining two drivers. The company, however, conditioned their return upon the adoption and signature of the following statement:

> I have reconsidered my resignation of employment with the A&D Davenport Transportation Inc. Sun-Fair Special Trans-portation Service, a Division of

A & D Davenport Transportation Inc. that occurred on April 3, 1979 and I request to be rehired and I promise to obey all of the Company's rules and as well as orders given by management and my dispatcher. I regret that I ordered or took an order quote (sic) "All Sun Fair Drivers Come to Base" about 12:00 noon which was not given by management or my dispatcher.

While one driver signed the document, Warfield and another refuse.

II

At the outset, we note that in reviewing the Board's finding of an unfair labor practice, our standard of review is well-settled.

To establish a violation of section 8(a)(1), the Board must demonstrate that the employer's conduct might reasonably tend to interfere with the exercise by employees

> of rights protected under the Act. See NLRB v. Illinois Tool Works, Inc., 153 F.2d 811, 814 (7th Cir. 1946).... (W)e should accept the Board's decision involving violations of the Act unless the evidence on the record as a whole indicates that the Board's decision is unjustified as either a fair interpretation of the evidence or as an informed exercise of the Board's judgment on matters within its area of general competence. See Universal Camera Corp. v. NLRB, 340 U.S. 474, 490 (1951).

Sioux Products, Inc. v. NLRB, No. 81-2356 slip. op. at 3-4 (7th Cir. August 2, 1982). Further, in reviewing the Board's decision we do not independently weigh the evidence contained in the record. Consolo

v. Federal Maritime Commission, 383 U.S. 607, 620 (1966). The Board's decision cannot be set aside merely because, considering the question de novo, this court might reach a different conclusion. The Board's order should be enforced if the record containes substantial evidence to support it. Beth Israel Hospital v. NLRB, 437 U.S. 483, 501 & n.18 (1978); Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951). The Supreme Court has, on various occasions, defined "substantial evidence" as:

> such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Consolidated Edison Co. v. Labor Board, 305 U.S. 197, 229. (I)t must be enough to justify, if the trial were to a jury, a refusal

> to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury. Labor Board v. Columbian Enameling & Stamping Co., 306 U.S. 292, 300. This is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence. Labor Board v. Nevada Consolidated Copper Corp., 316 U.S. 105, 106; Keele Hair & Scalp Specialists, Inc. v. FTC, 275 F.2d 18, 21.

Consolo, 383 U.S. at 620. By an definition, the standard of review is limited in scope. It is, moreover, intentionally narrow, for it "frees the reviewing courts of the time-consuming and

difficult task of weighing the evidence, it gives proper respect to the expertise of the administrative tribunal and it helps promote the uniform application of the statute." Id.

The Board concluded the company violation Sec. 8(a)(1) by discharging the seven drivers who signed the questionnaire.2/
The ALJ expressly found that the employees were fired for indicating their dissatisfaction with working conditions at Sun-Fair and for threatening to walk out if their demands were not met. The company disputes this conclusion and argues that the employees were not discharged at all. The company contends that the evidence presented in the unfair labor practice proceedings demonstrates that the employees voluntarily quit their jobs after Montgomery and Davenport refused

to meet their demands. . Both the ALJ and the Board rejected this argument. The ALJ found that "the record . . . is barren of any suggestion that the seven drivers were quitting on April 3 . . . "and "to view the drivers' concerted conduct on April 3, as tantamount to a voluntary mass quitting is unreasonable in the extreme. . . " A review of the record indicates that substantial evidence supports that view.

The actions of Sun-Fair officials strongly support the conclusion that the company, not the employees, terminated the employment relationship. Read literally, the document the drivers were initially asked to respond to neither states nor implies that by signing the document the drivers resigned. The

document was merely a poll and only required the employees to express their satisfaction or dissatisfaction with working conditions at Sun-Fair. Moreover, though Montgomery testified at the hearing that he believed that the employees resigned upon signing the document, his statements at the meeting contradict that testimony. When Madison asked Montgomery whether signing the document, his statements at the meeting contradict that testimony. Whem Madison asked Montgomery whether signing the questionnaire would affect his employment Montgomery simply replied that he did not know whether the drivers would be fired for signing the questionnaire. The ALJ found that conversation inconsistent with Montgomery's later explanation at the hearing and discredited that portion of his testimony.

The statement is also significant for it not only contradicts the company's contention that the drivers resigned but it also directly supports the Board's conclusion that they were fired. The statement indicates that Montgomery had not foreclosed the possibility of discharging the drivers involved in the protest. The other actions of company officials indicate this was the course of action taken. A statement of the company's intentions could not have been more clear than when Davenport, the owner, told the drivers to get off her property, after Warfield threatened a walk out. Soon after, Montgomery took the medicar keys from the dissatisfied drivers who signed the questionnaire and ordered them to leave the premises. When these employees arrived in uniform the following morning, Montgomery

had removed their time cards, and when they asked to work he told them that "there was no work for them." Moreover, minutes later Davenport arrived with the police to evict the drivers from the premises and when one driver asked to be reinstated she told him "you do not work here any more." In this light, the record, considered as a whole, adequately supports the Board's conclusion.3/

The company eventually rehired five of the seven drivers. Only Warfield and another driver were not reemployed. The Board found that the company also violated Sec. 8(a)(1) by making reemployment contingent upon adoption of the company drafted "rehirement" letter. The company does not contest the Board's conclusion that an employee's reinstatement may not be conditioned on the waiver of

rights protected under Sec. 7, 29 U.S.C. Sec. 157. Accord American Cyanamid Co. v. NLRB, 592 F.2d 356, 363-64 (7th Cir. 1979). Rather, the company only disputes the Board's finding that the reinstatement letter had that effect. The company argues that the letter, at most, extracted a promise to adhere to company rules and could not reasonably be construed--as the ALJ found--to be an apology for the past exercise of protected rights or an implied promise to forego the future exercise of those rights. We believe substantial evidence again supports the Board's view.

The company concedes in its brief that the plain language in the letter required the signer to admit his "regret" of the April 3 work stoppage before he was permitted to return to work. Given this concession, there is little to

dispute the the Board's conclusion. It therefore follows that the letter might reasonably discourage the employees' future exercise of protected rights. See Sioux Products, slip. op. at 3.

Finally, the company argues that the drivers were not protected "employees" under the Act because they failed to provide the ten-day statutory notice under Sec. 8(g), 29 U.S.C. Sec. 158(g), before leaving work. That statute provides:

> A labor organization before engaging in any strike, picketing, or other concerted refusal to work at any health care institution shall, not less than ten days prior to such action, notify the Federal Mediation and Conciliation Service of that intention,.... The notice shall state the date and time

that such action will commence. The notice, once given, may be extended by the written agreement of both parties.

The company argues that because over ninety-seven percent of its revenues derive from fees paid for transporting public medical assistance recipients to medical appointments, it is a health care institution under Sec. 2(14) of the Act.4/ See North Suburban Blood Center v. NLRB, 661 F.2d 632 (7th Cir. 1981). Congress passed Sec. 8(g) in 1974 as part of the Health Care Amendments, Pub. L. No. 93-360, 88 Stat. 395, to the National Labor Relations Act, 29 U.S.C. Secs. 151 et seq. Enacting those amendments, Congress altered national labor relations law, which for more than two decades had excluded medical employees from all

protection under the Act. NLRB v. International Brotherhood of Electrical Workers, Local 388, 548 F.2d 704, 708 n.8 (7th Cir. 1977). Congress took this step because it believed the national health care industry had grown too large to leave its nearly 1.5 million employees entirely unprotected, id., and that the increased economic benefits which unionization would bring to health care workers would induce more qualified individuals into the filed and thus improve the quality of national health care, Beth Israel Hospital, 437 U.S. at 497-98. Nevertheless, Congress did not discard its concern that sudden strikes or work stoppages in the health care field could seriously disrupt the flow of medical services and needlessly jeopardize patient

health and safety. Id. at 499. Consequenlty, Congress passed the special provisions for strike notice and mediation embodied in Sec. 8(g). Id. These apply exclusively to the health care field.

The company argues that the work stoppage here was precisely the type of labor dispute Congress intended Sec. 8(g) to avoid. It contends that the dispute forced patients to miss scheduled medical appointments and because some appointments were extremely difficult to reschedule many patients were left entirely without medical care. In particular, the company asserts that because one driver, hearing Warfield's call, proceeded immediately to base and left the patient he was transporting in the medi-car during the meeting, this dispute was an especially egregious incident. The company did not

raise the issue before the ALJ and, consequently, presented little evidence at the hearing on the point. The company first presented the issue, on its appeal of the ALJ's decision to the Board. The Board assumed, for argument, that the company was a health care institution but found that because the drivers were neither a "labor organization" nor had engaged in "a concerted refusal to work," they were not required under Sec. 8(g) to provide advance notice of a work stoppage.

The company first contests the Board's determination that the employees were not engaged in a concerted refusal to work. This is one of the three prerequisites Congress provided must be satisfied under Sec. 8(g) before a group of medical workers need provide notice. Because the record adequately supports the Board's conclusion, we

dismiss the company's argument on this basis and therefore we need not consider the other aspects of the Board's decision.5/

The company asserts the drivers engaged in a concerted refusal to work in calling the meeting. While Warfield's initial call was unexpected, the meeting itself was not unauthorized. Montgomery was aware of the call from the outset but did not override the order. In fact, several drivers called the base to verify the command. Montgomery told the drivers to return to base.

Moreover, the company does not contend, and we do not believe, the drivers refused to work by leaving the premises after the meeting. As mentioned, they left at Davenport's and Montgomery's order. Both made it clear that the drivers were fired for voicing their dissatisfaction with

working conditions. Even then the employees expressed a willingness to continue working. One driver told Montgomery that a patient in his medi-car was still waiting for transportation to his medical appointment. The ALJ found this statement was "akin to asking whether he should complete the delivery -- and certainly showed a willingness to work." At most, the record indicates that Warfield, as the employee's spokesman, raised the possibility of a work stoppage when he threatened to prevent all vehicles from leaving the grounds. The drivers did not act upon that threat.

Finally, the company argues that the Board's conclusion ignores the ALJ's factual determination that the employees were engaged in an economic strike. A careful reading of the ALJ's decision does not indicate that he

concluded the employees had called a strike. The ALJ only found that Montgomery believed the drivers were engaged in a strike. He reached that conclusion after examining Montgomery's statements and conduct at the meeting and ultimately concluded this belief conflicted with Montgomery's later testimony at the hearing, where he stated the workers voluntarily quit their jobs. The ALJ did not adopt Montgomery's conclusion. That conclusion was inconsistent with his subsequent determination that the drivers had been discharged. In this light, the record adequately supports the Board's conclusion that the employees had not engaged in a concerted refusal to work. Congress did not require health care employees discharged from their jobs to provide notice under Sec. 8(g) in order to preserve their status

as employees under the Act.6/

Thus, for the reasons previously expressed, the Board's decision is ENFORCED.

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* The Honorable William J. Campbell, Senior District Judge for the Northern District of Illinois, is sitting by designation.

1/ In full, Sec. 8(a)(1) provides:

> It shall be an unfair labor practice for an employer--
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7; . . . .

2/ The Company does not dispute the Board's conclusion that the employees, presenting grievances to their employer, engaged in a form of concerted activity traditionally protected under Sec. 7 of the Act, 29 U.S.C. Sec. 157, see NLRB v. Washington Aluminum Co., 370 U.S. 9, 14 (1962), and could not be fired in retaliation for engaging in that activity, United Merchants and Manufacturers, Inc. v. NLRB, 554 F.2d 1276, 1278 (4th Cir. 1977).

3/ The ALJ also found that the company violated Sec. 8(a)(1) by circulating the questionnaire. Though the ALJ did not discuss the point in his decision, there is adequate basis in the record to support the conclusion that the action raised a significant fear of reprisal in the employees' minds and interfered with the exercise of their rights under Sec. 7. We need not consider whether the language contained in the document alone instilled that fear because Montgomery made the possibility obvious when, responding to Madison's question of whether he would be fired for siding with the dissatisfied employees, Montgomery stated that he had not yet decided. In this light the questionnaire was more than an

effort by the company to accurately estimate the extent of dissatisfaction among its drivers.

4/ Section 2(14) of the Act defines a "health care institution."

> The term "health care institution" shall include any hospital, convalescent hospital, health maintenance organization, health clinic, nursing home, extended care facility, or other institution devoted to the care of sick, infirm, or aged persons.

5/ Under Sec. 8(g), 29 U.S.C. Sec. 158(g), the employees must be (1) employed by a "health care institution," (2) engaged in a "concerted refusal to work," and (3) acting in unison as a "labor organization," before they must provide their employer advance notice. The Board expressly declined to consider whether Sun-Fair was a health care institution because it found the drivers did not fall within the other statutory requirements. Since the Board's finding that the employees had not engaged in a concerted refusal disposes of the issue, we need not consider the company's additional arguments that it is a health care institution under Sec. 2(14) and that the employees were acting as a labor organization under Sec. 2(5) in presenting grievances to their employer.

6/ Given this conclusion, we need not consider the company's alternative argument that the drivers were economic strikers and its refusal to reinstate all drivers was justified by legitimate economic reasons, NLRB v. Great Dane Trailers, Inc., 388 U.S. 26 (1967), and the drivers' failure to fully comply with the Board's decision in Laidlaw Co., 171 NLRB 1366 (1968), in requesting reinstatement.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

A & D DAVENPORT TRANSPORTATION, INC. AND SUN-FAIR SPECIAL SERVICE TRANSPORTATION, A DIVISION OF A & D DAVENPORT TRANSPORTATION, INC.

and Case 13--CA--18713

RICHARD WARFIELD, an Individual

DECISION AND ORDER

On January 13, 1981, Administrative Law Judge Harold Bernard, Jr., issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief. The General Counsel filed an answering brief.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions[2] of the Administrative Law Judge, as modified herein, and to adopt his recommended Order, as modified.[3]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified, and hereby orders that the Respondent, A & D Davenport Transportation, Inc. and Sun-Fair Special Service Transportation, a Division of A & D Davenport Transportation, Inc., Chicago, Illinois, its officers, agents, successors, and assigns, shall take the action set forth in said recommended Order, as modified:

1. Substitute the following for paragraph 1(b):

(b) Requiring any employee, by signing a document, letter or otherwise, to admit that he resigned his job when in fact he or she had been discharged for engaging in protected concerted activities and requiring any employee to apologize for engaging in concerted activities seeking better working conditions, or to agree not to engage in such activities as a condition of employment."

2. Add the following to paragraph 2:

"(d) Notify the Regional Director for Region 13, in writing, within 10 days from the date of this Order, what steps the Respondent has taken to comply herewith."

3. Substitute the attached notice for that of the Administrative Law Judge.

Dated, Washington, D.C., June 10, 1981

John H. Fanning, Chairman

Howard Jenkings, Jr., Member

Don A. Zimmerman, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

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[1] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. Standard Dry Wall Products, Inc., 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

We clarify, however, the chronology of

events as reported by the Administrative Law Judge by finding, based on the credited testimony, that Davenport's order to the drivers to "get the hell off the premises" occurred after Montgomery had passed around the "questionnaire" and had responded to drivers' questions about it.

We also note, as a matter of clarification, that, in referring to G.C. Exh. 4--the letter sent by Respondent to the dischargees in July--the Administrative Law Judge clearly intended to also refer to G.C. Exh. 5, the actual "apology" statement that Montgomery required those wishing to return to sign.

[2] In addition to the reasons set forth by the Administrative Law Judge for finding the July letter and apology to be violative of Sec. 8(a)(1), we note that G.C. Exh. 5 (the "apology" statement) included an admission that the dischargee had in fact resigned, thus leaving the impression that he was waiving any right to contend that he had been discharged for engaging in protected concerted activity when, in fact, such activity was the reason for his termination. Requiring such an admission as a prerequisite to employment is an interference with employee rights guaranteed by Sec. 7. We shall amend the recommended Order accordingly.

We further observe that the unlawful character of Respondent's behavior in passing around the April 3 questionnaire is highlighted by the fact that, when one of the drivers asked if signing it would affect their jobs, Montgomery answered that he did not know, leaving the drivers in doubt as to whether they would be fired or otherwise adversely affected if they formally expressed their dissatisfaction with current terms and conditions of employment.

We reject Respondent's contention, made for the first time in its brief in support of exceptions to the Administrative Law Judge's Decision, that it is a health care institution and that therefore the drivers forfeited the

protection of the Act by engaging in a concerted refusal to work without giving 10 days' notice pursuant to Sec. 8(g) of the Act. The strictures of Sec. 8(g) apply only to labor organizations as defined in Sec. 2(5). Here, the group (unaffiliated with any existing labor organization) was totally unstructured and was doing nothing more than presenting grievances; such a group is not a statutorily defined labor organization. N.L.R.B. v. Long Beach Youth Center Inc., 591 F. 2d 1276 (9th Cir. 1979); Walker Methodist Residence and Health Care Center, Inc., 227 NLRB 1630, 1631 (1977). Further, the record here does not reveal a concerted refusal to work. While the drivers were apparently called in by employee Warfield, Montgomery made no effort to countermand Warfield's order, and did not order the assembled drivers to return to work. Consequently, the drivers could assume that Montgomery had no objection to discussing the grievances then and there. It being unnecessary to the disposition of the case, we express no opinion as to whether Respondent is a health care institution as defined in the Act.

3 The Administrative Law Judge inadvertently omitted from his recommended Order the requirement that Respondent notify the Regional Director as to what steps it has taken to comply with such a provision.

Member Jenkins would compute the interest due on backpay in accordance with his partial dissent in Olympic Medical Corporation, 250 NLRB No. 11 (1980).

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

A & D DAVENPORT TRANSPORTATION, INC. AND SUN-FAIR SPECIAL SERVICE TRANSPORTATION, A DIVISION OF A & D DAVENPORT TRANSPORTATION, INC.

and Case 13-CA-18713

RICHARD WARFIELD,

An Individual

William G. Kosol, Esq., Chicago, IL, for the General Counsel.
Lester Shapiro, Esq. and Albert L. Zemel, Esq., Chicago, IL, for the Respondent.
Peter M. Katsaros, Esq., Chicago, IL, for the Charging Party.

DECISION

Statement of the Case

HAROLD BERNARD, JR., Administrative Law Judge: A hearing was held on November 6, 7, 8, and 9, 1979, in Chicago, Illinois on the complaint allegations that Respondent terminated employees because they engaged in protected concerted activities thereby violating Section 8(a)(1) of the Act. Respondent's answer denied any vioaltion of the Act and asserts that the employees voluntarily quit their employment.

Upon the entire record, including my observation of the witnesses and a consideration of the parties' briefs, I make the following:

Findings and Conclusions

I. Jurisdiction

Respondent admits, the record shows, and I find that Respondent, an Illinois corporation engaged, inter alia, in the transportation of handicapped, ambulatory, or medically-infirmed persons to and from treatment centers and their residences is an employer engaged in commerce within the meaning of the Act. President Dorothy Davenport and Roy Montgomery, general manager, are admittedly agents of Respondent.

II. The Unfair Labor Practices

The credited testimony1/ shows as follows:

The April 3 Meeting

On April 3, Respondent's 11 medi-car drivers returned to base around noon in response to a call over their radios to ". . . return to base," an unusual call given its timing in mid-day when the record shows that there were many deliveries or transporting of patients yet to be completed. It is in serious dispute who gave the command, but I find it very unlikely that Respondent's general manager Roy Montgomery, or its dispatcher Richard Jones would make such a call and thereby willingly risk a severe disruption in essential medical-patient services, especially since the record is devoid of any emergency warranting such a move. Moreover, as will be further evident, there is no indication that Montgomery made such a call as part of any plan to retaliate against the drivers because of an earlier talk that morning with driver Richard Warfield wherein Warfield had registered requests with Montgomery for improved pay, hospitalization and other benefits on behalf of the drivers. In fact, the record shows numerous prior contacts between the drivers and Montgomery between November 1978 and April 1979, (and among the drivers themselves) without a trace of resentment or objection to

such discussions on the part of Montgomery or any other Respondent representative. I note also that driver Nixon Goldsby testified without denial by Warfield that the latter had telephoned him the night before with a message that Warfield might call the men to base next day if he were unsuccessful in efforts to secure improved benefits from Montgomery. The fact that Warfield also had a meeting that same evening he called Goldsby with four other drivers on the same subject of his proposed efforts the next day with Montgomery is consistent with the view that the drivers were responding to a not unexpected directive by Warfield.

As the drivers pulled into base, parked, and then entered the lounge, it is alleged that their vehicle keys wer taken from them, a further disputed occurrence, and one wherein, for essentially the same reasons as noted above, there is little reasonable basis on which to make such a finding. Suffice it to say that such an allegation flies in the face of earlier events, which show no resentment, anger, animus, or displeasure by Respondent towards the drivers' action, to that point in events at least, as would in any way explain such a move. Were the Respondent bent on retaliating for the return to base conduct alone, it is inescapable in my view that it would have taken the simple step earlier of countermanding Warfield's order, admittedly heard by Montgomery, Jones, and a secretary in the office who recognized Warfield's voice when the order was given. No such countermanding effort was made. Furthermore, the fact that Mongtomery, in an introduction-like gesture told the then assembled drivers that "Mr. Warfield is your spokesman. I guess he wants to say something," suggests the view that Respondent did not angrily take the drivers' keys as they entered the meeting, but in fact, assumed a wait-and-see, not inhospitable attitude towards unfolding events.

This posture towards the employees' obvious

intentions to secure better pay, insurance benefits, and the like changed drastically during the course of the meeting, which lasted about an hour or so. Warfield, who had informed Montgomery earlier that morning privately that he was spokesman for the drivers and that they wanted better pay, repeated the request. Montgomery, also in a repeat of earlier comments to Warfield explained that Respondent had no money available for such purpose but that if Public Aid, an Illinois public service deparmtnet, gave Respondent an increase that employees would then get a raise. During the meeting, Montgomery also stated that he had insurance forms on his disk but could not start such benefit until Respondent received more money.

As discussion on the employees' requests and Montgomery's responses ensued, Respondent's president, Dorothy Davenport moved from her office next door, where she could overhear the conversation closer to the lounge where she could then see events firsthand. She recalls Warfield saying that maybe the whole Company should march downtown, that such might benefit the whole company, a reference to the idea that Public Aid might thereby be pressured into increasing payments for Respondent's services with a resultant increase in money available for wage increases. Concurrent with the talk going on, Montgomery was receiving calls from agency clientele asking about his intentions with regard to scheduled pickups and deliveries of patients, and--as discussion reacher greater stages of intensity--Montgomery sketched out a petition-like questionnaire directing all employees who ". . . want to work under the present working conditions" to sign in one place [below] and "All those who do not agree with the above statement," [to sign at another place.] (G.C.-2) Before this was passed around, Montgomery testified further that he told employees that Respondent was operating "in the red," to which Warfield responded that ". . . If we could not get it then we will have to go, see?" At that point, Mrs. Davenport came into

the lounge further and said "no." When Warfield continued that no one would drive a car out, she said she would do so, and told the drivers to ". . . get the hell off the premises." Montgomery further testified that about this time during a call from a client, he was asked about the "strike business" and told the caller he would get back to him later. During a second telephone call about an 11:30 pickup that had not been made, Montgomery told the caller, from a neighborhood Public Aid office, that he had a "labor dispute" and returned to the meeting. At this point, Montgomery's own testimony is that, ". . . There seemed to be a split thing there but it looked like there were some who wanted to strike and some who did not want to strike." (Emphasis added.) Alleging as a reason for doing so that he did not know who wanted to work and who did not, he handed the petition-questionnaire (G.C.-2) to Montgomery to be passed around for signing. Driver Wardell Madison questioned Montgomery whether signing the form would affect his employment, whether he would be fired, to which Montgomery merely replied he would have to think about it. Driver Willie Williams testified he heard Warfield say that they were doing "this" to show Springfield that they meant business and not to hurt him, and that Montgomery said he did not condone or agree with a strike. Williams added that during the meeting, he heard Warfield say that ". . . they (Respondent) could not hire anyone to take their places." According to driver Wardell Madison, after the paper (G.C.-2) was signed, Montgomery told the drivers, "you can all leave now." When Madison stated he had a patient, Mrs. Davenport came in, took his keys and others and told him not to worry about it. The seven drivers who had signed the petition-questionnaire in the section provided for those who did not agree with the statement contained thereon (that they wanted to work under present conditions) left the premises. The others, Williams, Armstrong, Goldsby, and King, remained and performed driving duties that afternoon to complete uncancelled deliveries.

At that point in time, alleging that the seven drivers had "voluntarily" walked outside, and were not discharged, Montgomery testified nevertheless he considered that the seven had lost their jobs by quitting, because "They physically walked out," and pulled their time-cards the next morning, April 4. For their part, the seven drivers, after first assembling in a parking lot and then visiting a police station to see how they could get their jobs back, met at driver Butler's home and decided they were not "up to a strike." The following morning, at 5:30 a.m., April 4, all seven showed up at Respondent's office doorway in uniform and ready for work. They learned that their time-cards had been pulled and that "There was no work for them." I credit the Charging Party's version that the men asked for their jobs back2/ and the record shows that notwithstanding that request, the men were told by Davenport who arrived shortly afterward with the police, in response to a request by driver Bracy for his job, that "You do not work here anymore." Montgomery admitted that during this encounter, Warfield stated that it was Montgomery who told the men to strike in order to exert pressure from Public Aid for an increase, and that Montgomery said he could not condone a strike, but could not stop it either. Montgomery also testified in response to my question why he did not consider that the men had returned to work on the 4th that it was because they had only come as far "as his doorway." In response to a further question, he admitted hiring two new employees for work the following week or so, although, except for drivers Butler and Davis, he did not rehire the remaining employees among the seven because, "by walking off, they had quit their jobs, and it was my privilege to hire or rehire who I wanted to do the job for me."

On April 10, the drivers again appeared at Respondent's office in uniform and were told by Montgomery that if they wanted their paychecks they would have to turn in their unfirms, and the drivers did so. The record shows that the men were paid their entire pay through Tuesday,

April 3.

Analysis

It is fundamental that employees are protected from employer reprisals for engaging in concerted activity which seeks to improve their working conditions. The fact that on April 3, the seven drivers were so engaged in this case is beyond question. For the Respondent, through Montgomery, to view the drivers' concerted conduct on April 3, as tantamount to a voluntary mass quitting is unreasonable in the extreme, and Respondent's reasons for doing so can spring from only one source, hostility towards the seven drivers because of their concerted activity. The record, as indicated, is barren of any suggestion that the seven drivers were quitting on April 3; certainly the petition-questionnaire does not admit of such an interpretation in this context of events. In the first place, nowhere does it appear on G.C.-2 that the signers were evidencing anything more than what they "want[ed]" and clearly it does not state that if they did not "want" present conditions that they were intent on quitting. In the second place, Montgomery himself, replied in answer to a question by one of the drivers about the significance of signing it that "he did not know." He also testified that the men did not lose their jobs by signing G.C.-2 but by walking out, by quitting. Next, the record is replete with evidence that Montgomery himself, considered that the seven drivers, far from abandoning their jobs voluntarily, i.e., quitting, were withholding their services from Respondent in order to secure improvements in their working conditions in the form of better wages, i.e., that they were engaging in a strike--the classic kind of protected concerted conduct under the Act. The term strike in reference to the drivers' plans, was frequently used during these events. That Respondent chose to effect the termination of the seven drivers by characterizing them as having quit does not alter the fact that the employees were given the clear

impression by both Davenport--who ordered the men off the premises after they had signed G.C.-2, and had indicated an intention to walk off--by the fact that their keys were taken in the course of the meeting, and by Montgomery, who also told the men to leave, that they had been discharged.

General Counsel's observation that at no time did Respondent simply request the men to return to work is also relevant in this regard, as is the fact that driver Wardell Madison's statement that there was a patient waiting to be delivered--a statement akin to asking whether he should complete the delivery--and certainly showing a willingness to work--was met with a response indicating no interest in his or any of the seven employees doing the driving. It is clear from these circumstances that Respondent's efforts to characterize the conduct of the seven drivers who signed G.C.-7 in the space afforded those "who do not want to work under the present working condition" as having quit manifested an intent to retaliate against them for their indicated lack of satisfaction with present working conditions coupled this time with the anticipation by Respondent that, as its own witnesses' testimony establihes, a strike could possibly occur unless it moved to improve employees' pay. There is no other basis in the record for explaining Respondent's actions towards the seven employees than this, and I find the seven employees, Richard Warfield, William Butler, Louis Larkin, Bobby Bracy, Wardell Madison, Henry Davis, and Michael Taylor were unlawfully discharged because of such protected concerted activity at the conclusion of the April 3 meeting in violation of Section 8(a)(1) of the Act. Ridgeway Trucking Company, 243 NLRB No. 160 (slip op. August 1979); Bolsa Drainage, Inc., 242 NLRB No. 105 (slip op. June 1979); and Cone Brothers Contracting Company, 135 NLRB 108. That the termination occurred prior to the departure of the seven from the Respondent's premises is proven by Davenport's ordering them off the property during the meeting, Montgomery's directive that they leave,

the drivers' keys to their assigned vehicles being taken from them, the absence of any request by the Respondent that employees continue working until day's end when the circumstances did not require an interpretation that a strike then and there was underway--as contrasted with only an anticipated possible walkout and finally, the Respondent's further relieving the drivers of their duties by rejecting Madison's offer to complete delivery of a patient waiting in Respondent's vehicle in the yard. For Respondent to force matters even to the point where it incurred numerous trip cancellations without trying to either suggest a further meeting at the close of business, or another way to negotiate the situation away from the showdown context it created, strongly suggests further that Respondent's conduct was motivated by animus towards the employees compelling a decision to sever them from employment regardless of cost. The events following April 3, described fully above, substantiate the finding that the employees were discharged as of that date and need no further elaboration.

The General Counsel alleges further that G.C.-2, and a later "rehirement" letter (G.C.-4) containing an apology for employees to sign, together with an assurance to obey Respondent's instructions--mailed to employees in July 1979 as part of an alleged offer of reinstatement amount to violations of Section 8(a)(1) because employees are, in effect, made to choose between exercising their rights under Section 7 of the Act or facing termination (or a denial of reemployment). It is clear that the G.C.-2 document was used as a tool to bring to light those employees who intended to adhere to efforts to seek improvements in their working conditions or this certainly was the impression created, and that those employees were discharged. Respondent thereby created the impression that in order to continue employment, employees must forego engaging in protected concerted activities else their employment would be in serious jeopardy. Regarding the "rehirement" letter, it is axiomatic that

employees may not be required to either apologize for exercising Section 7 rights or in effect, agree to refrain from such activities as a price for their continued employment, and this document plainly seeks such a surrender of rights. In addition, G.C.-4 contains impermissible preconditons for reemployment and therefore, does not constitute a valid offer of reinstatement such as would toll backpay. For these reasons, I find that by using these documents, G.C.-2 and G.C.-4, Respondent has further violated Section 8(a)(1) of the Act, Bell Burglar Alarm, Inc., 245 NLRB No. 127 (slip op. September 1979); 726 Seventeenth Inc., t/a Sans Souci Restaurant, 235 NLRB 604, 606; and Don Pizzolato, Inc., 249 NLRB No.136 (slip op. May 1980 and cases cited therein at pp. 5 and 6).

Conclusions of Law

1. Respondent A & D Davenport Transportation, Inc. and Sun-Fair Special Service Transportation, a Division of A & D Davenport Transportation, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. By requiring employees, as a condition of continued employment or reimployment, to sign documents wherein employees forego the right to engage in walkouts or other protected concerted activities seeking to improve working conditions, and employees apologize for doing so in the past, the Respondent has engaged in unfair labor practices in violation of Section 8(a)(1) of the Act.

3. By discharging employees Richard Warfield, William Butler, Louis Larkin, Bobby Bracy, Wardell Madison, Henry Davis, and Michael Taylor on April 3, 1979 because of their protected concerted activities, the Respondent has engaged in unfair labor practices in violation of Section 8(a)(1) of the Act.

4. The aforesaid unfair labor practices

affect commerce within the meaning of Section 2(6) and (7) of the Act.

III. The Remedy

Having found that Respondent violated Section 8(a)(1) of the Act, the Respondent shall be ordered to cease and desist therefrom, and take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Respondent unlawfully discharged Richad Warfield, William Butler, Louis Larkin, Bobby Bracy, Wardell Madison, Henry Davis, and Michael Taylor, the Order will provide that the Respondent offer to each of them immediate and full reinstatement to their former jobs, or, if such positions no longer exist, to substantially equivalent positions, without prejudice to their rights and privileges, and to make each of them whole for any loss of earnings they may have suffered as a result of the discrimination against them by payment to them of a sum equal to that which each normally would have earned, absent the discrimination, from the dates of their discharges to the dates of the Respondent's offers of reinstatement, with backpay and interest computed in accordance with the Board's established standards set forth in F. W. Woolworth Company,3/ and Florida Steel Corporation.4/

As the Respondent's conduct found unlawful herein demonstrates ". . . a general disregard for the employees' fundamental statutory rights," a broad remedy is warranted.5/

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:6/

ORDER

The Respondent, A & D Davenport Transportation, Inc. and Sun-Fair Special Service

Transportation, a Division of A & D Davenport Transportation, Inc., its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Requiring any employee, by signing a document or other means, to choose between engaging in concerted activities seeking better working conditions and discharge.

(b) Requiring any employee, by signing a document, letter or otherwise, to apologize for engaging in concerted activities seeking better working conditions and to agree not to engage in such activities as a condition of employment.

(c) Discharging employees because they engaged in concerted activities seeking better working conditions.

(d) In any other manner interfering with, restraining, or coercing its employees in the exercise of rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Offer Richard Warfield, William Butler, Louis Larkin, Bobby Bracy, Wardell Madison, Henry Davis, and Michael Taylor immediate and full reinstatement to their former jobs, or, if those jobs no longer exist, to substantially equivalent positions of employment, without prejudice to their seniority or other rights and privileges and make each whole for any lost earnings with interest thereon to be computed according to the formula described above in the section entitled "The Remedy."

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other

records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post at its Chicago, Illinois, location, copies of the attached notice marked, "Appendix."7/ Copies of the notice, on forms provided by the Regional Director for Region 13, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt thereof, and be maintained for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

Dated, Washington, D.C., January 13, 1981

HAROLD BERNARD, JR.
Administrative Law Judge

1/All testimony has been weighed carefully. The following is a composite based upon both credibility and, where conflicts arose which are not resolvable on the basis of testimonial demeanor, the inherent likelihoods or certainties as shown by admitted or known events.

2/I agree with the General Counsel's position that the list of "grievances" shown to Montgomery by the men, who had prepared it at the suggestion of local police, did in no way amount to a precondition behind the offer to return to work. It was not suggested to be such by them and does not outweigh their obvious desire for employment.

3/90 NLRB 289 (1950).

4/231 NLRB 651 (1977). See generally, Isis

Plumbing & Heating Co., 138 NLRB 716 (1962).

5/Hickmott Foods, Inc., 242 NLRB No. 177 (slip op. June 1979).

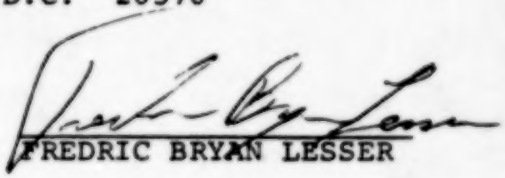
6/In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

7/In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

CERTIFICATE OF SERVICE

I, FREDRIC BRYAN LESSER, certify that I served three copies of the foregoing Petition for Writ of Certiorari by mailing this 29th day of November, 1982, to the following-named attorney by depositing in the U.S. mail located at One North LaSalle Street, Chicago, Illinois at 5:00 p.m.

Elliott Moore, Esq.
Deputy Associate General Counsel
National Labor Relations Board
Washington, D.C. 20570



FREDRIC BRYAN LESSER